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Client Perjury: The Law in Florida

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Client Perjury: The Law in Florida

Randolph Braccialarghe*

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I. Introduction

At a deposition taken by the defense counsel of a plaintiff in a personal injury case, a Florida lawyer who represents the plaintiff/deponent hears the following:

- (by opposing counsel) Q: "Why did you go to Dr. X?"
A: "My back hurt."
Q: "How did you select Dr. X?"
A: "From the Yellow Pages."

The lawyer knows that both of these answers are false. The client had never been to any doctor before his lawyer told him to go to Dr. X.

- (1) What should a Florida lawyer do?
 - (A) Ask for a recess and instruct his client to correct the answers?
 - (B) If the client refuses, should the lawyer disclose the correct answers to opposing counsel?
 - (C) May the lawyer ignore his client's untruthful answers?
- (2) Would a lawyer's obligations be different if the two false answers were given at a trial in response to opposing counsel's cross examination?
- (3) If the lawyer's client were a criminal defendant and the false answers were given in response to the prosecution's cross examination, would a Florida lawyer ethically be able to ignore his client's untruthful answers?

In each of these three situations, (1) the civil client's lying at a deposition, (2) the civil client's lying at trial, and (3) the criminal defendant's lying at trial, the answer is the same—an ethical Florida lawyer must attempt to get his client to recant the false testimony and answer truthfully, and if the client refuses, the lawyer must disclose to the opposing counsel (at deposition) or to the court (at trial).¹

In an attempt to more clearly state a Florida lawyer's duty when a client intends to lie or lies under oath, on March 3, 1988, the Florida Bar's Special Committee on Perjured Testimony² proposed an amend-

1. FLA. RULES OF PROFESSIONAL CONDUCT Rules 4-1.2, 4-1.6, 4-3.3, 4-3.4, 4-4.1, 4-8.4; FLA. STAT. §§ 837.02, 777.011 (1987); Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981).

2. Committee members in attendance at the March 3, 1988 meeting were: Robert C. Josefsberg, Chairman, Annemarie Harris Block, Randolph Braccialarghe, Jerry

ment to the Rules of Professional Conduct, Chapter 4 of the Rules Regulating the Florida Bar. The change would make clear that it is impermissible for a Florida attorney to permit his client, even a criminal defendant, to testify falsely, even in the narrative form. This article will examine the law in Florida on a lawyer's duty when his client intends to lie and will argue that the Board of Governors should recommend and the Supreme Court of Florida should adopt the Special Committee on Perjured Testimony's proposed amendment.

The Special Committee on Perjured Testimony was appointed by Florida Bar President Ray Ferrero after Florida attorney Ellis Rubin was held in contempt for refusing to continue representation of a criminal defendant who, Rubin implied, intended to lie on the witness stand.³ While unsuccessful in convincing the courts that he was right,⁴ Rubin proved more skillful in convincing the media that he was held in contempt for not suborning perjury.⁵ As this article will discuss, Rubin

Butterfield, John Delaney (on behalf of T. Edward Austin, Jr.), Dwight L. Geiger, Kim C. Hammond, Marvin U. Mounts, Jr., Janet Reno, James T. Russell, Jon A. Sale, Richard Shiffrin, Wilhelmina Tribble, Gary R. Trombley. Also present was Florida Bar staff liaison Patricia J. Allen.

3. *Sanborn v. State*, 474 So. 2d 309 (Fla. 3d Dist. Ct. App. 1985); *Rubin v. State*, 490 So. 2d 1001 (Fla. 3d Dist. Ct. App. 1986), *rev. denied*, 501 So. 2d 1283; *cert. denied*, 107 S. Ct. 3228 (1987).

4. Rubin's adjudication of direct criminal contempt was affirmed by the appellate courts and he ultimately served a 30-day jail sentence.

5.

Decision denies justice for Rubin

What a messed-up sense of right and wrong Americans must sometimes endure from their criminal justice system. Notions of fairness, reasonableness and common sense are too often absent, substituted with legal game-playing encouraged by judges who ought to know better.

Now comes the U.S. Supreme Court to uphold yet another bizarre, irrational bit of legal mumbo-jumbo, denying justice, encouraging criminals to lie in court, allowing attorneys to violate their own oath not to be a party to perjury, and unjustly punishing an attorney who stood up for honesty.

The justices, without comment, let stand a contempt of court ruling issued against Miami attorney Ellis Rubin, who had refused to abide by a judge's order to continue representing an accused murderer who he said planned to lie in court. Earlier, the 3d District Court of Appeal and the Florida Supreme Court had unwisely upheld the contempt citation.

Rubin now not only has an unwarranted criminal conviction, but risks being disciplined by the Florida Bar or even losing his right to practice law for upholding the truth.

In a Dade County jail without enough room for all the violent

misstated the issue, as the proposed amendment, the Rule it seeks to amend, and the Code then in effect all prohibit an attorney's suborning perjury.

II. History Of The Ethical Rules Governing Florida Lawyers Before Enactment Of The Rules Of Professional Conduct

A. *Canons of Professional Ethics*

In 1941, the Supreme Court of Florida adopted a code of ethics governing Florida attorneys,⁶ and later, in 1955, the Supreme Court of Florida promulgated Florida's Canons of Professional Ethics, also referred to as the Code of Ethics.⁷ These ethics rules were based on the ABA Canons of Professional Ethics⁸ and urged an attorney's conscience, honor and sense of fair play as the touchstone against which to

criminals who deserve to be there, Dade Circuit Court Judge Sidney B. Shapiro found room to incarcerate Rubin. He finished a 30-day jail term on March 10 on the contempt charge, imposed when he stopped representing Russell Sanborn.

Before the trial, in September 1985, Rubin told the judge that Sanborn intended to lie under oath, and was cited after he disobeyed the judge's oath to stay on the case. Another attorney went on to represent Sanborn, who was convicted of first degree murder and sentenced to life in prison.

Rubin should be praised for taking a stand on principle, not treated like a criminal. His only crime was to recognize that his duty to represent his client was outweighed by a higher duty, as an officer of the court, to uphold the Florida Bar's own code of ethics and prevent a jury from being deceived by a lie.

He was a victim of a Catch-22 dilemma, banned by one Bar ethics rule from revealing what his client told him in confidence, to justify stepping down from the case, and forbidden by another rule from suborning perjury on the witness stand.

Rubin plans to ask Gov. Martinez for a pardon, to erase the contempt citation from his record. Justice demands that a pardon be granted.

Ft. Laud. News/Sun-Sentinel, June 28, 1987 at 4G col. 1.

6. 145 Fla. 664, 778 (1941).

7. Integration Rule of the Florida Bar, Art. 10, FLA. STAT. (1957). The language of Florida's Canons which were adopted in 1955 is identical to the language which was adopted in 1941, which in turn, is, for the most part, identical to the language in the ABA Canons of Professional Ethics.

8. The ABA Canons of Professional Ethics were adopted in 1908 and applied until the adoption of the ABA Model Code of Professional Responsibility in 1970.

judge one's decisions. Under both the Florida and ABA Canons, a lawyer's obligation to society appeared paramount and it was clear that representation of a client was to occur within the strictures of one's duty to society and to the Bar.

The language of 13 of the Canons is pertinent to the situation of a lawyer who is faced with a lying client.

Canon 5, The Defense or Prosecution of Those Accused of Crime, states that ". . .the lawyer is bound, by all *fair and honorable* means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."⁹ [emphasis added] Canon 8 advised a lawyer to ". . .endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable results of pending or contemplated litigation."¹⁰

In discussing how far a lawyer was permitted to go in supporting a client's cause, Canon 15 stated:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duty than does the *false claim*, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. . . . But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, *violation of law* or any manner of *fraud* or chicanery. He must obey his own conscience and not that of his client.¹¹ [emphasis added]

9. Canon 5 of the 1941 version of Florida's code of ethics governing attorneys; Canon 5 of Florida's Canons of Professional Ethics, adopted in 1955; and Canon 5 of the ABA Canons of Professional Ethics. Unless the language is different, all future references to a canon will be to all three, Florida's 1941 version, Florida's 1955 version, and the ABA Canons of Professional Ethics.

10. Canon 8.

11. Canon 15. Similarly, Canon 18 did not permit the client to be ". . .the keeper of the lawyer's conscience in professional matters." Also, Canon 22 required that a lawyer's conduct be characterized by candor and fairness and reminded the lawyer that he ". . .should not offer evidence which he knows the Court should reject. . ." as the lawyer was charged with the duty of aiding the administration of justice.

Canon 24 stated that in the matter of trial tactics, ". . .no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety."

A lawyer was required to uphold the honor of the profession, and:

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.¹²

Under the Canons, an attorney was also required to preserve his client's confidences. However the Canons, as forerunners to the Model Code of Professional Responsibility and the Model Rule of Professional Conduct, also put a limit on a lawyer's duty to preserve client confidences.

The announced intention of a client to commit a crime is not included within the confidences which [a lawyer] is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.¹³

Canon 41 similarly limited a lawyer's duty to his client, in that:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if

12. Canon 29, which also reminded a lawyer that "he should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

In that regard, Canon 31 reminded the lawyer that

The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

Furthermore, as Canon 32 pointed out,

No client . . . is entitled to receive nor should any lawyer render any service or advise involving disloyalty to the law whose ministers we are . . . or deception or betrayal of the public. . . . Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law . . . [b]ut above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and moral citizen.

13. Canon 37.

his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.¹⁴

From this language, it is clear that it would not have been permissible under the Canons for a Florida lawyer to let his criminal defendant client give false testimony, in the narrative form or otherwise. If a lawyer learned that perjury had been committed, Canon 29 required that he disclose it.

B. *Code of Professional Responsibility*

Before January 1, 1987, the date the Rules of Professional Conduct took effect, Florida attorneys were governed by the Code of Professional Responsibility. Florida's Code had been in effect since 1970 and was modeled after the American Bar Association's Model Code of Professional Responsibility. Florida's Code, however, was not an exact

14. Canon 41. Also, where a client would insist upon an unjust or immoral course of conduct in his case or persist in wrongdoing, an attorney was required to consider withdrawal by Canons 16 and 44 of Florida's 1955 Canons and the ABA Canons and by Canons 16 and 43 of Florida's 1941 Canons.

The Supreme Court of Florida promulgated 33 additional ethics and principles to both the 1941 and 1955 Canons. Those pertinent to a lying client included paragraphs 15, 16, 24, 27 and 28.

Rules Governing the Conduct of Attorneys in Florida.

No person heretofore or hereafter admitted to practice law in Florida, shall

.....

15. Introduce or offer to introduce any testimony which he knows to be false or forged;

16. Fail to offer to exclude, or omit to disavow, disclaim, and seek the elimination, from the case of any false or forged evidence or testimony, promptly upon learning that it is false or forged;

.....

24. Knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

.....

27. Be guilty of any deceit or willful misconduct in his profession;

28. Do any act which by the law of Florida constitutes a felony involving moral turpitude;

.....

duplicate of the ABA Model Code. For example, while Canon 4 of both codes required an attorney to keep his client's confidences,¹⁵ the ABA Model Code PERMITTED a lawyer to reveal the intention of his client to commit a crime and the information necessary to prevent the crime,¹⁶ while Florida's Code REQUIRED a lawyer to reveal that information.¹⁷ Furthermore, both the ABA Model Code and the Florida Code of Professional Responsibility prohibited a lawyer from knowingly using perjured testimony, participating in the creation of false evidence, assisting a client in illegal or fraudulent conduct, or engaging in illegal conduct.¹⁸ Moreover, a Florida lawyer who learned that his client had perpetrated a fraud upon a person or the tribunal had a duty to reveal the fraud if the client refused or was unable to rectify the fraud.¹⁹

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (B) (1970). FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1970).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (C) (1970). A Lawyer MAY reveal:

(3) The intention of his client to commit a crime and the information necessary to prevent the crime. [emphasis added]

17. FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2) (1970). A lawyer SHALL reveal: [t]he intention of his client to commit a crime and the information necessary to prevent the crime. [emphasis added]

18. FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1970). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1970)
REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

(A) In his representation of a client, a lawyer shall not:

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious the evidence is false.

(7) Counsel or assist his client in conduct the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

19. FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (B) (1970). A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he SHALL REVEAL THE FRAUD TO THE AFFECTED PERSON OR TRIBUNAL. [emphasis added]

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Finally, DR 1-102 prohibited a lawyer from engaging in certain illegal conduct, conduct involving dishonesty, fraud, deceit or misrepresentation, or to engage in conduct prejudicial to the administration of justice.²⁰

C. *Florida Case Law and Statutes*

1. *Case Law*

The Supreme Court of Florida has consistently held that the attorney-client privilege will not protect communications between an attorney and a client which constitute the making of a false claim or the perpetration of a fraud and that an attorney is required to disclose to the tribunal when he learns that his client has perpetrated a fraud on the tribunal. The case of *Kneale v. Williams*²¹ involved a debtor who was accused of fraudulently concealing funds from his creditors. The debtor's attorney objected to being deposed as to the receipt and disbursement of funds on the grounds of the attorney-client privilege. In requiring the attorney to answer the questions, the court held:

It appears to be well settled that the perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to the communication and transaction between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud.²²

The protection which the law affords to communications between attorney and client has reference to those which are legitimately and properly within the scope of lawful employment. It does not

This language of the Florida Code tracked the ABA Model Code when the latter was first promulgated. However, in 1974, DR 7-102(B)(1) of the ABA Model Code was amended so that "except when the information is protected as a privileged communication" was added to the end of DR 7-102(B)(1). Florida did not amend its Code.

20. FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1970). MISCONDUCT

(A) A lawyer shall not:

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

21. 30 So. 2d 284 (Fla. 1947).

22. *Id.* at 287.

... extend to communications ... made in contemplation of ... a crime, or perpetration of a fraud.²³

*Dodd v. The Florida Bar*²⁴ involved the review of disbarment proceedings against a lawyer who advised several persons to give false testimony in two personal injury actions in Dade County. In affirming the disbarment, the court held:

In our system the courts are almost wholly dependent on members of the Bar to marshal and present the true facts of each cause in such manner as to enable the judge or jury to [decide the] facts to which the law may be applied.

When an attorney adds or allows false testimony ... he ... makes it impossible for the scales [of justice] to balance.²⁵

*The Florida Bar v. Simons*²⁶ and *The Florida Bar v. Agar*²⁷ involved the discipline of two lawyers who counseled giving of false testimony. While both attorneys had a hand in suggesting fraud, the court in *Agar* also noted:

It is clear from the record that Agar knew the testimony in question on behalf of his client was false and that he did nothing to reveal the fraud to the court.²⁸

23. *Id.* at 287, citing *Standard Fire Insurance Co. v. Smithhart*, 183 KY. 679, 211 S.W. 441 (1919).

24. 118 So. 2d 17 (Fla. 1960).

25. *Id.* at 19. In his concurring opinion, Justice Terrell quoted extensively from the Code of Ethics, including this excerpt from Canon 29:

Counsel upon the trial of a cause in which perjury has been committed owes it to his profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

Id. at 20.

26. 391 So. 2d 684 (Fla. 1980). Simons' clients were involved in the purchase of a home under Veteran's Administration financing. When the Veteran's Administration rejected the original purchase price of \$38,000, VA financing was obtained by listing the selling price as \$33,000 and by delivery of a promissory note in the amount of \$5,000 in violation of the laws governing VA financing. When the VA began an investigation, attorney Simons advised his clients to persist in their story that the \$5,000 note was for a pre-existing debt. *Id.* at 685.

27. 394 So. 2d 405 (Fla. 1981). Attorney Agar represented a husband in an uncontested divorce. When Agar realized that his client's wife would not be permitted to testify as to his client's residency, Agar called the wife to testify under a false name and asked that she hide her relationship with his client from the court. *Id.*

28. *Id.* at 406.

In addition to being disciplined by the Supreme Court of Florida, Agar's involvement in the perjury resulted in the state attorney prosecuting him for violations of sections 777.011 and 837.02 of the Florida Statutes.²⁹

The above four cases make clear that no privilege attaches to attorney-client communications about making a false claim or perpetration of a fraud, and that an attorney has a duty to not aid a client to present false evidence and to reveal to the court if false evidence has been offered. In this sense, these cases are consistent with the sections of the Code of Professional Responsibility which imposed the same duties on attorneys, and with a string of other cases where attorneys were disciplined for knowingly using or encouraging others to use false evidence.³⁰

29. *Id.* at 405.

30. *Florida Bar v. Langford*, 126 So. 2d 538 (Fla. 1961) (attorney disciplined for testifying falsely to a bar grievance committee and for trying to get another attorney to commit perjury). Langford had filed a forged deed but did not learn it was a forgery until after the deed had been recorded, at which time he took steps to erase the cloud on the title. When a grievance committee investigated, Langford attempted to cover up his actions by stating that he had borrowed money from a lawyer in another county and then Langford tried to get the lawyer to back up his statement. *Id.* at 539.

Florida Bar v. King, 174 So. 2d 398 (Fla. 1965), involved a lawyer who confessed that his actions involved misconduct but who was, nevertheless, not disciplined because he had, in effect, suffered enough. King was a state senator who was slated to be President of the 1957 Florida Senate, assuming success in the 1956 election. King paid \$10,000 to buy off his opponent who gave King a signed announcement of the opponent's withdrawal from the senate race. After King announced that his opponent had withdrawn, the opponent stated that the whole thing had been a trap to establish that King had tried to bribe the opponent. King was then helped by the Sheriff of Polk County who procured two deputies to testify that it was really King who had entrapped his opponent and that the deputies, who alleged they had been part of the scheme all along, supposedly witnessed the payoff from a secret spot. King lied before the grand jury and the deputies perjured themselves and later pled guilty to perjury. However, the supreme court did not discipline King as they thought he had suffered enough:

We are now confronted with the question of whether or not we should further damage respondent by taking away from him his profession of thirty-nine years' standing. He has suffered degradation and humiliation, the loss of reelection to the senate, as well as the presidency of the senate, the loss of \$10,000 and the torment of being under criminal prosecution for a number of years. In spite of this, according to all of the evidence presented, he has at all times since that episode nine years ago conducted himself in an exemplary manner as a man and as a lawyer. The testimony reflects that since this occasion he has given his clients "gold plated" service in his legal representation of them. He has the support of every circuit

2. Florida Statutes

Three Florida statutes which affect the confidential nature of attorney-client communications and a lawyer's duty to stop or reveal a client's perjury are sections 90.502³¹, 837.02³² and

judge of his circuit, as well as the Bar of that area. In addition, other prominent and substantial non-lawyer citizens appeared in his behalf. *Id.* at 404.

Florida Bar In Re Brooks, 336 So. 2d 359 (Fla. 1976) (attorney reprimanded for falsely swearing at a coroner's inquest).

Florida Bar v. Pearce, 356 So. 2d 317 (Fla. 1978) (attorney reprimanded for knowing of and participating in plans of witnesses to perjure themselves at a coroner's inquest).

Florida Bar v. Morales, 366 So. 2d 431 (Fla. 1978) (attorney disciplined for, among other reasons, allowing his client to commit perjury).

Florida Bar v. Hagglund, 372 So. 2d 76 (Fla. 1979) (attorney disciplined for, among other things, submitting a false and incorrect affidavit in a lawsuit, claiming that no money had been paid towards a \$7,500 loan when in fact there had been several payments).

31. FLA. STAT. § 90.502 (1987).

LAWYER-CLIENT PRIVILEGE

(1) For purposes of this section:

(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The lawyer, but only on behalf of the client. The lawyer's author-

777.011.³³ Florida Statute section 90.502 creates a lawyer-client evidentiary privilege and permits the client to prevent another from disclosing the content of confidential communications made to enable the lawyer to provide legal services.³⁴ However, the lawyer-client privilege that was created by section 90.502, Florida Statutes, does not protect

ity to claim the privilege is presumed in the absence of contrary evidence.
(4) THERE IS NO LAWYER-CLIENT PRIVILEGE UNDER THIS SECTION WHEN:

(a) THE SERVICES OF THE LAWYER WERE SOUGHT OR OBTAINED TO ENABLE OR AID ANYONE TO COMMIT OR PLAN TO COMMIT WHAT THE CLIENT KNEW WAS A CRIME OR FRAUD. [emphasis added]

(b) A communication is relevant to an issue between parties who claim through the same deceased client.

(c) A communication is relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer, arising from the lawyer-client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

32. FLA. STAT. § 837.02 (1987).

PERJURY IN OFFICIAL PROCEEDINGS -

(1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense.

33. FLA. STAT. § 777.011 (1987).

PRINCIPAL IN FIRST DEGREE — Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

34. FLA. STAT. § 90.502(2) (1987). The creation of this privilege is significant because all common law privileges that existed in Florida were abolished by FLA. STAT. § 90.501.

the communication where the services of the lawyer were sought or obtained to help in the commission or the planning of a crime or a fraud.³⁵ Section 837.02, Florida Statutes, makes perjury in an official proceeding a felony in Florida and section 777.011 proscribes aiding, abetting, or counseling commission of a felony. Assisting a client to commit perjury or failing to disclose the client has committed perjury, would violate sections 837.02 and 777.011.³⁶

D. *Was a Criminal Defendant's Perjury Permitted, if Given in a Narrative Form, Under Florida's Code of Professional Responsibility?*

During the last year and a half that Florida lawyers' ethical behavior was governed by the Code of Professional Responsibility,³⁷ a Florida court issued an opinion, *Sanborn v. State*,³⁸ which contained dicta that suggested that it was acceptable to permit a criminal defendant to testify falsely in the narrative form.

Russell Sanborn was a criminal defendant charged with murder who was appointed a public defender in April 1984. Conflicts between Sanborn and his attorney resulted in July 1984 in the appointment of a special public defender, who was in turn permitted to withdraw and replaced by two specially appointed defense attorneys. In February 1985, Sanborn requested that Ellis Rubin be substituted as his counsel and after initially denying the request, the trial court appointed Rubin after Rubin announced that he would be ready for trial on April 29, 1985 and the defendant assured the court that he would continue with Rubin as his counsel. Rubin moved to withdraw on the day of trial, implying that his client wanted him to present evidence which Rubin knew to be false. Rubin appealed the denial of his motion to the Third District Court of Appeal.³⁹ Under the facts presented, where a criminal defendant had been incarcerated awaiting trial for over a year, the ap-

35. FLA. STAT. § 90.502(4)(a) (1987).

36. Joseph Agar, the disbarred attorney of *The Florida Bar v. Agar*, cited in footnote 27 *supra*, was indeed prosecuted for violation of FLA. STAT. § 777.011 and 837.02 (1977).

37. On January 1, 1987, Florida's Code of Professional Responsibility was superseded by the Rules of Professional Conduct. The Rules of Professional Conduct comprise Chapter 4 of the Rules Regulating The Florida Bar, which were adopted July 17, 1986 (494 So. 2d 977).

38. 474 So. 2d 309 (Fla. 3d Dist. Ct. App. 1985).

39. *Id.* at 310-311.

pellate court held that it was not an abuse of discretion for a trial judge to deny a motion to withdraw presented the day of trial by the fourth defense attorney appointed, notwithstanding the fact his client wanted him to present false testimony. Having addressed the issue presented, the opinion went on to recognize that an attorney had a duty to not participate in the presentation of false evidence,⁴⁰ to misread Florida's Code of Professional Responsibility⁴¹ and to hand down dicta⁴² that

40.

In representing a client, an attorney is held to strict requirements under the law and Florida's Disciplinary Rules which prohibit the use of fraudulent, false or perjured testimony or evidence. A lawyer may not knowingly use perjured testimony or false evidence or make a false statement of law or fact. In addition, a lawyer may not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; nor may he counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Id. at 311, citing to Florida Code of Professional Responsibility DR 7-102(A) and DR 1-102 and Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1980).

Regardless of the client's wishes, defense counsel must refuse to aid the defendant in giving perjured testimony and also refuse to present the testimony of a witness that he knows is fabricated Thus, a defendant cannot compel his counsel to call witnesses to present a fabricated alibi or any other false testimony, nor compel the introduction of false evidence. . . . Since the defendant's right to effective assistance of counsel does not include the right to require an attorney to perpetrate a fraud on the court, it is generally considered that a refusal to call a particular witness because of obedience to ethical standards which prohibit the presentation of fabricated testimony does not constitute ineffective assistance of counsel.

Sanborn, 474 So. 2d at 312.

Accordingly, in the present case, Rubin should disregard any instructions from the defendant concerning trial strategy and tactics if Rubin should determine that following the instructions would be either contrary to the defendant's best interest or contrary to Rubin's ethical obligations as an attorney.

474 So. 2d at 313.

41. The court in *Sanborn* cited to FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1970) for the proposition that Rubin had an ethical obligation and, therefore, was correct when he refused to reveal his client's confidences with regard to the proposed perjured testimony. 474 So. 2d at 311. However, DR 4-101(B), the rule that established the attorney-client confidence, was by its own terms subject to DR 4-101(D). DR 4-101(D) states a lawyer *SHALL* reveal:

(2) The intention of his client to commit a crime *AND THE INFORMATION NECESSARY TO PREVENT THE CRIME*. [emphasis added] This would require an attorney to disclose the specifics so the client could not later testify falsely. *See also* Braccialarghe, *Representation of a Criminal Defendant Who Intends to Lie*, FLA. B. J.

sanctioned use of the narrative as a means to permit a client to commit perjury. *Sanborn's* dicta re use of the narrative as a means of permitting a defendant to testify falsely was contrary to the Code of Professional Responsibility which had been promulgated by the Supreme Court of Florida. In his concurring opinion, Judge Pearson suggested that that issue was not ripe for deciding and would not be unless Sanborn was convicted, in which case there would be time to examine whether Rubin behaved ethically and effectively.⁴³ At this point, Ellis Rubin could have tried to appeal *Sanborn v. State* to the Supreme Court of Florida or resumed representation of Sanborn and chosen one of the several options that the rules and case law permitted him, including: not putting Sanborn on the stand;⁴⁴ letting Sanborn take the stand under the threat of disclosure of the specifics of any false testi-

at 29, 30 (July/August 1987).

42. As Judge Pearson stated in his concurring opinion, I believe, however, that the majority's dicta, "deciding" that Rubin would be both ethical and effective if, at trial, he disowns defense testimony he perceives to be perjurious, constitutes an uncalled for advisory opinion.

474 So. 2d at 315.

43. In suggesting the use of the narrative, the court in *Sanborn* said that this was the most often sanctioned position and cited three cases, an appellate case from Alaska, *Coleman v. State*, 621 P.2d 869, 881 (Alaska 1980), *cert. denied*, 454 U.S. 1090, 102 S. Ct. 653, 70 L.Ed.2d 628 (1981), an appellate case from South Carolina, *State v. Covington*, 279 S.C. 274, 305 SE.2d 578, 580 (1983), and a trial court case from New York, *People v. Salquerro*, 107 Misc.2d 155, 433 N.Y.S.2d 711, 714 (N.Y. Supp. Ct. 1980).

These three cases base their authority for use of the narrative form for a criminal defendant who intends to lie on the American Bar Association's Standards Relating to the Administration of Criminal Justice, specifically Standard 4-7.7 found in Chapter 4, The Defense Function. Standard 4-7.7 is rather weak support for the proposition permitting a criminal defendant to lie in the narrative for a number of reasons, including: (1) the Supreme Court of Florida never adopted the ABA Standards; (2) before the standards were submitted to the House of Delegates for approval during the February 1979 meeting, Standard 4-7.7 was withdrawn and was, therefore, never enacted by the ABA House of Delegates; and (3) even had Standard 4-7.7 been adopted by the ABA House of Delegates, it was in conflict with the Code of Professional Responsibility DR 4-101(D)(2), DR 7-102(A)(4) and DR 7-102(B)(1)—which had been promulgated by the Supreme Court of Florida. Even more curious is the fact that the court in *Sanborn* was aware of the decision of the United States Court of Appeals for the Seventh Circuit of *U.S. v. Curtis*, 742 F.2d 1070 (7th Cir. 1984), which affirmed the conviction of a criminal defendant who was not permitted to testify by his counsel who believed the defendant would perjure himself, holding that a criminal defendant did not have a constitutional right to testify perjurally. *Curtis*, 742 F.2d at 1076.

44. See *supra* note 43 for a discussion of *U.S. v. Curtis*.

mony in an attempt to dissuade perjury;⁴⁵ or even to follow the suggestion in the dicta of *Sanborn* by letting *Sanborn* testify in the narrative. Had Rubin chosen any one of these options, the effectiveness of his representation could have been challenged if *Sanborn* had been convicted. However, Rubin elected to ignore the lawful order of the trial court, thereby denying the Supreme Court of Florida the opportunity to address *Sanborn's* dicta, which departed from disciplinary rules and case law.

The next pronouncement on the subject from the Supreme Court of Florida came on January 1, 1987, when the Rules of Professional Conduct replaced the Code of Professional Responsibility.⁴⁶

III. The Rules Of Professional Conduct

A. *What the Rules Say With Regard to a Lawyer's Duty When a Criminal Defendant Wants to Testify Falsely*

The Florida Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct which were adopted by the House of Delegates of the American Bar Association on August 2, 1983. For the most part, the Florida Rules and the Comment sections which follow the Rules were taken verbatim from the ABA Model Rules. However, just as the Florida Code of Professional Responsibility gave less protection than did the ABA Model Code to an attorney-client confidence whose object was to perpetrate a fraud, Florida's Rules of Professional Conduct similarly give less protection and require more disclosure than do the ABA Model Rules.⁴⁷ While the main rule that governs whether an attorney may permit his client to testify perjurally in a narrative is 4-3.3, Rules 4-1.6, 4-1.2, 4-3.4, 4-4.1 and 4-8.4 also apply.

The attorney-client confidence is governed by Rule 4-1.6,⁴⁸ which

45. FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2), DR 7-102(A)(4), and DR 7-102(B)(1) (1970).

46. 494 So. 2d 977.

47. See discussion of FLA. RULES OF PROFESSIONAL CONDUCT rules 4-1.6 & 4-3.3 (1987), *infra*. MODEL RULES OF PROFESSIONAL CONDUCT rule 1.6 and 3.3. (1983).

48. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987).

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

PERMITS an attorney to reveal information to the extent he believes necessary to comply with the Rules of Professional Conduct⁴⁹ but REQUIRES that he reveal information to prevent a client from committing a crime or to prevent death or substantial bodily harm to another.⁵⁰ The requirement that a Florida lawyer reveal information to prevent his client from committing a crime, while consistent with Florida's former Code of Professional Responsibility, is a departure from the ABA Model Rule.⁵¹ The Comment to 4-1.6 makes clear how broad a Florida attorney's duty is to disclose client confidences to prevent the attorney from becoming an accomplice in the fraudulent acts of his client:

However, none of the foregoing limits the requirement of disclosure in Paragraph (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client.⁵²

(b) A lawyer SHALL REVEAL such INFORMATION to the extent the lawyer believes NECESSARY:

(1) TO PREVENT A CLIENT FROM COMMITTING A CRIME;

or

(2) To prevent a death or substantial bodily harm to another. [emphasis added]

(c) A lawyer MAY REVEAL such INFORMATION to the extent the lawyer believes necessary:

(1) To serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) To respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) TO COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT.

(d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies. [emphasis added]

49. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6(c)(5) (1987). Section (c)(5) makes it clear that a lawyer's duty to keep his client's confidences is subordinate to a lawyer's duty to follow the rules. ABA Model Rule 1.6 has no analogous section.

50. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6(b) (1987).

51. ABA Model Rule 1.6 is permissive and only applies to criminal acts which are likely to result in imminent death or substantial bodily harm.

52. Paragraph 5 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987).

...[T]he lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(b). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in a criminal or fraudulent conduct.⁵³

Even though a past act of a client has been completed, where that act might result in present or future consequences, to prevent future death or substantial bodily harm, a Florida attorney must now disclose the client's past act, even though he learned of it in a confidential communication.⁵⁴ As Paragraph 21 of the Comment to Rule 4-1.6 makes clear, the rule that created the attorney-client confidence is subject to, among others, the rules that deal with candor toward the tribunal (4-3.3) and truthfulness in statements to others (4-4.1).

Under Rule 4-1.2(b), a lawyer may not counsel a client to engage in, or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.⁵⁵ Rule 4-3.4(b) prohibits a law-

53. Paragraph 10 of Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987).

54. Paragraph 13 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987).

55. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.2 (1987).

SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A LAWYER SHALL NOT COUNSEL A CLIENT TO ENGAGE, OR ASSIST A CLIENT, IN CONDUCT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS CRIMINAL OR FRAUDULENT. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law. [emphasis added]

(e) When a lawyer knows or reasonably should know that a client expects assistance not permitted by the rules of professional conduct or by

yer from fabricating evidence or counseling or assisting a witness to testify falsely.⁵⁶ Rule 4-4.1 is copied verbatim from ABA Model Rule 4.1 and states that a lawyer SHALL not fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rules 4-1.6.⁵⁷ The limitation, which refers to disclosure prohibited under

law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

56. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.4 (1987).

FAIRNESS OF OPPOSING PARTY AND COUNSEL

A LAWYER SHALL NOT:

(a) Unlawfully obstruct another party's access to evidence; or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding. A lawyer shall not counsel or assist another person to do any such act.

(b) FABRICATE EVIDENCE, COUNSEL OR ASSIST A WITNESS TO TESTIFY FALSELY, or offer an inducement to a witness that is prohibited by law. [emphasis added]

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

(d) In pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) It is reasonable to believe that the person's interests will not be adversely affected by refraining from giving such information.

57. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-4.1 (1987).

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Rule 4-1.6, has meaning in the ABA Model Rules but not in the Florida Rules of Professional Conduct since, unlike ABA Model Rule 1.6, Florida Rule 4-1.6 permits disclosure of a client confidence in order for the attorney to comply with the Rules of Professional Conduct.⁵⁸

A Florida lawyer is also subject to discipline per Rule 4-8.4 if he violates the Rules of Professional Conduct,⁵⁹ commits a criminal act

COMMENT

MISREPRESENTATION

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentation can also occur by failure to act.

STATEMENTS OF FACT

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

FRAUD BY CLIENT

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by rule 4-1.6.

58. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6(c)(5) and Paragraph 21 of the Comment to 4-1.6 (1987). Apparently, the Florida drafters missed this one.

59. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-8.4 (1987).

MISCONDUCT

A lawyer shall not:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official; or

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

that reflects adversely on his honesty or trust-worthiness,⁶⁰ engages in conduct involving dishonesty, fraud, deceit or misrepresentation,⁶¹ or engages in conduct that is prejudicial to the administration of justice.⁶² As can be seen from these rules alone, it is clear that a Florida lawyer may not stand silently by while his client commits perjury, even in narrative form, and this determination does not even take into consideration the main rule which governs perjury by a criminal defendant, Rule 4-3.3.⁶³

60. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-8.4(b) (1987).

61. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-8.4(c) (1987).

62. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-8.4(d) (1987).

63. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

CANDOR TOWARD THE TRIBUNAL

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) Make a false statement of material fact or law to a tribunal;

(2) FAIL TO DISCLOSE A MATERIAL FACT TO A TRIBUNAL WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY THE CLIENT;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE. IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES.

(b) THE DUTIES STATED IN PARAGRAPH (a) CONTINUE BEYOND THE CONCLUSION OF THE PROCEEDING AND APPLY EVEN IF COMPLIANCE REQUIRES DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 4-1.6.

(c) A LAWYER MAY REFUSE TO OFFER EVIDENCE THAT THE LAWYER REASONABLY BELIEVES IS FALSE.

(d) In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. [emphasis added]

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

REPRESENTATION BY A LAWYER

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present as-

sertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare rule 4-3.1. However, an assertion purporting to be on the lawyer's own knowledge, as an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 4-1.2(d), see the comment to that rule. See also the comment to rule 4-8.4(b).

MISLEADING LEGAL ARGUMENT

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

FALSE EVIDENCE

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

PERJURY BY A CRIMINAL DEFENDANT

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer

should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible if trial is imminent, if the confrontation with the client does not take place until the trial itself, or if no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three (3) resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both competing principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The third resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See rule 4-1.2(d).

REMEDIAL MEASURES

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Candor toward the tribunal is governed by Rule 4-3.3 which requires that:

- (a) A lawyer shall not knowingly: . . .
 - (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; . . .
 - (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue BEYOND the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6 [emphasis added].⁶⁴

By its very terms, Rule 4-3.3 is deafening in its clarity. A lawyer may not present perjured testimony and even has a duty to disclose informa-

CONSTITUTIONAL REQUIREMENTS

The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.

REFUSING TO OFFER PROOF BELIEVED TO BE FALSE

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

EX PARTE PROCEEDINGS

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

64. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

tion acquired under the attorney-client privilege which would otherwise be protected.⁶⁵ Moreover, the duty of disclosure that 4-3.3 imposes on Florida attorneys continues BEYOND the conclusion of a proceeding, so that even after the attorney has withdrawn from a case, if he learns that his former client has perpetrated a fraud upon the court, the attorney must disclose this fact to the court.⁶⁶ Lest there be any doubt as to the interpretation of 4-3.3, the drafters of the ABA Model Rule gave us a 15 paragraph comment explaining the Rule and the drafters of the Florida Rules kept 14 of those paragraphs.⁶⁷

Paragraph 8 of the Comment discusses the most difficult situation, the criminal defendant who

... insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of the prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, THE LAWYER PARTICIPATES, ALTHOUGH IN A MERELY PASSIVE WAY, IN DECEPTION OF THE COURT. [emphasis added]⁶⁸

Paragraphs 9 and 10 of the Comment discuss three resolutions that have been proposed to the dilemma when a criminal defendant wants to testify perjuriously. The Comment considers and rejects the first two: (1) permitting the accused to testify in the narrative and (2) excusing the attorney from the duty to reveal his client's perjury. The

65. Although, as we have seen, the attorney-client privilege under FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987) does not protect a client's intention to commit a crime or a client's commission of a past crime that has present or future consequences.

66. This is the one change in the language of the Rule that the Florida drafters of the Rules of Professional Conduct made when they otherwise adopted verbatim Model Rule 3.3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1983) states:

The duties stated in paragraph (a) continue TO the conclusion of the proceeding . . . [emphasis added]

The Florida drafters set no time limit on the end of an attorney's obligation. The drafters of this rule also adopted verbatim the Comment to Rule 3.3, with the exception of Paragraph 13 of the ABA Comment which was deleted and which established a time limit for the termination of the obligation. As there was no time limit established for the termination of the obligation of a Florida lawyer to disclose, Paragraph 13 of the ABA Comment was left out of Florida's Comment.

67. See *supra* note 63.

68. Paragraph 8 of Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

third resolution, the one adopted by the Rules, is that the lawyer must reveal the client's perjury to comply with his ethical obligations and with his obligations under the law.⁶⁹

The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances.⁷⁰

The Comment also suggests that a lawyer attempt to dissuade his client from committing perjury or withdraw if that would remedy the situation, but it points out that withdrawal is not always possible or would not always remedy the situation, as where a client had offered false evidence, in which case the lawyer must make disclosure to the court.⁷¹ Even withdrawal before the client has committed perjury is not of much more help, as a Florida attorney is required to disclose information necessary to prevent his client from committing a crime⁷² and would have a duty to inform the tribunal of any criminal or fraudulent act by his client that involved a fraud upon the court even beyond the conclusion of the proceeding.⁷³

The Comment to Rule of Professional Conduct 4-3.3 recognizes that an advocate's ethical duty "may be qualified by constitutional provisions for due process and the right to counsel in criminal cases."⁷⁴ After the drafters of the ABA Model Rules noted that caveat in the Comment to Rule 3.3 and after the drafters of Florida's Rules adopted that same language from the Comment, the concern expressed in the Comment was rendered moot by the United States Supreme Court in its opinion in *Nix v. Whiteside*.⁷⁵ *Nix v. Whiteside* involved an appeal of a murder conviction. Defendant Whiteside, who had been charged with second degree murder, told his attorney, Gary Robinson, that he stabbed the victim in self defense, as he felt the victim was reaching for

69. Paragraph 10 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

70. Paragraph 12 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

71. Paragraph 11 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

72. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6(b)(1) (1987).

73. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3(a)(2) and (b) (1987).

74. Paragraph 12 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

75. 106 S. Ct. 988 (1986).

a gun. Before the trial, Whiteside told Robinson that he was going to say that he saw the victim's gun, a fact that Whiteside had previously denied. Robinson then told his client that Robinson would not allow Whiteside to commit perjury, and that if Whiteside committed perjury, Robinson would disclose it to the court. Whiteside then testified truthfully, was convicted and appealed based on ineffective assistance of counsel. The conviction was affirmed by the Iowa Supreme Court, the United States District Court refused to issue a writ of habeas corpus, but the United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted on the basis of ineffective assistance of counsel. The United States Supreme Court then reversed the Court of Appeals and reinstated the conviction. Writing for the majority, Chief Justice Burger commended the manner in which Robinson forestalled Whiteside's intended perjury. The Court declined to find that Robinson's threatening to disclose perjury constituted ineffective assistance of counsel, reasoning that criminal defendants had no constitutional right to testify falsely nor to assistance of counsel in committing perjury. *Nix* has thus allayed the concern expressed in the caveat about a potential constitutional qualification to an attorney's requirement to disclose a criminal defendant's intention to commit perjury.⁷⁶

B. *How to Apply the Rules of Professional Conduct When a Criminal Defendant Wants to Testify Falsely*

A criminal defendant's expressed intention to testify falsely is not privileged.⁷⁷ An attorney must first attempt to dissuade a criminal de-

76. In arriving at the Court's decision, Burger cited *Harris v. New York*, 401 U.S. 222 (1971) and *United States v. Havens*, 446 U.S. 620 (1980), which permitted impeachment of a defendant by prior contrary statements which had been ruled inadmissible for the proposition that a defendant had no right to use false evidence. *Nix*, 106 S. Ct. at 998. Burger also cited with approval *United States v. Curtis*, 742 F.2d 1070, 1075 (7th Cir. 1984), which held it was not ineffective assistance of counsel for an attorney to keep his criminal defendant client from testifying where the attorney believed that his client would testify falsely, as there was no constitutional right to testify perjurally.

Burger noted that most courts rejected permitting a defendant to testify perjurally in a narrative form and noted further that the approach of the ABA Model Rules is to reject any participation or passive role by counsel in allowing defendant's perjury. *Nix*, 106 S. Ct. at 996 n. 6.

77. FLA. RULES OF PROFESSIONAL CONDUCT rules 4-1.6 and 4-3.3(a)(2) (1987).

fendant from testifying falsely⁷⁸ and may threaten to reveal the intended perjury.⁷⁹ If the client persists in his intention to testify falsely, the attorney must move to withdraw⁸⁰ and reveal information sufficient to prevent the commission of a crime,⁸¹ i.e. the inconsistent statement. This would permit the court to warn the client and alert the second attorney that, to forestall the perjury, the court may permit the prosecutor to impeach the criminal defendant by the prior inconsistent statement, and if the criminal defendant denies the prior inconsistent statement, then the judge may permit the prosecutor to call the first attorney as a witness for the purpose of impeachment, pursuant to section 90.614, Florida Statutes.⁸² Since the attorney's duty continues beyond the conclusion of his representation, if after he withdraws from the case, he learns that his former client committed a fraud upon the tribunal, the attorney must disclose that fact to the tribunal.⁸³

In the event the court does not permit the attorney to withdraw, the attorney must remain on the case.⁸⁴ If his client continues to insist on testifying falsely, the attorney may keep his client off the stand.⁸⁵ Should the client take the stand and testify falsely, the attorney must disclose this fact to the tribunal.⁸⁶ In which case, the court may require the attorney to remain on the case,⁸⁷ or permit the attorney to with-

78. FLA. RULES OF PROFESSIONAL CONDUCT rules 4-1.2(e), 4-2.1 and Paragraph 7 of the Comment to 4-3.3 (1987).

79. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6(b)(1) (1987) and *Nix*, 106 S. Ct. at 997.

80. Paragraph 7 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 and rule 4-1.16(a) (1) (1987).

81. FLA. RULES OF PROFESSIONAL CONDUCT rules 4-1.6(b) (1), 4-3.3(b) and Paragraph 12 of the Comment to 4-1.6 (1987).

82. For extrinsic evidence of a prior inconsistent statement to be introduced, the witness would first have to deny having said the prior inconsistent statement, at which point the court could permit the first attorney to be called as a witness about that unprivileged (because it involved the commission of a crime) prior inconsistent statement.

83. Paragraph 13 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 and Rules 4-3.3(a)(2) and 4-3.3(b) (1987).

84. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.16(c) (1987).

85. FLA. RULES OF PROFESSIONAL CONDUCT rules 4-3.3(a)(4), 4-3.3(c) (1987) and *Curtis*, 742 F.2d at 1075.

86. FLA. RULES OF PROFESSIONAL CONDUCT rules 4-3.3(a)(2), (4), Paragraphs 11 and 12 of the Comment to Rule 4-3.3, 4-1.6(c)(5) and Paragraph 5 to the Comment to 4-1.6 (1987).

87. FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.16(c) (1987).

draw, declare a mistrial and appoint a new attorney.⁸⁸ Where a second attorney has been appointed after a mistrial, the judge can attempt to forestall a defendant's perjury at a second trial by notifying him that if he lies on the stand at the second trial, the judge would permit the prosecutor to call the first lawyer to impeach the defendant's perjured testimony. Should a criminal defendant continue to lie to his subsequent attorneys in an attempt to create conflicts, the court could require the defendant to proceed without counsel:

An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.⁸⁹

IV. Proposed Amendment Of The Special Committee On Perjured Testimony

Given how clearly Florida's new Rules of Professional Conduct address an attorney's duty when a criminal defendant wants to testify falsely and the Florida Supreme Court's decisions regarding attorney-client confidences and false evidence, why would a special committee on perjured testimony be formed, much less why would it propose an amendment to the Rules of Professional Conduct? Even though Chief Justice Burger in *Nix v. Whiteside* noted that the Model Rules of Professional Conduct do not permit a narrative⁹⁰ and, in place of Criminal Defense Standard 4-7.7 which would have permitted a criminal defendant to testify falsely in a narrative form, the American Bar Association adopted Model Rule 3.3 which does not permit that testimony,⁹¹ there remains some confusion as to whether an attorney may permit his criminal defendant client to testify falsely in a narrative form.⁹² This

88. Paragraph 11 of the Comment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3 (1987).

89. *Id.*

90. *Nix*, 106 S. Ct. at 996 n. 6.

91. Standard 4-7.7 from Chapter 4 of the Defense Function was withdrawn from the American Bar Association's Standards Relating to the Administration of Criminal Justice and not even presented to the House of Delegates when the other standards were approved in February 1979.

92. Messing, *Representing a Criminal Defendant Who Intends to Lie*, FLA. B. J. at 29-31 (April 1987). In this otherwise excellent article, Professor Messing says that

confusion was perhaps exacerbated by dicta in the Third District Court of Appeal case of *Sanborn v. State*,⁹³ decided in the last year and a half that the Code of Professional Responsibility governed a Florida attorney's duty. Even though previous Florida case law and the terms of the Code itself seemed to militate against permitting a defendant to testify falsely in the narrative, the dicta in *Sanborn v. State* received wide currency in the popular press and gave the impression that an ethical lawyer had to choose between going to jail or putting on perjured testimony.

three solutions are OFFERED by Florida's Rules of Professional Conduct. By the word "offered", Professor Messing meant "discussed". [Conversation between the author and Professor Messing in April 1988.] However, it would be possible to read the word "offered" as "approved", and to misunderstand the article as saying that any one of the three solutions discussed is acceptable. In addition to use of "offered" for "discussed", the Messing article also had language suggesting that allowing "... a lying defendant to offer a 'narrative' answer . . . is apparently the preferred approach in Florida" and "... the use of narrative testimony mandated by the Third DCA may be considered as a 'safe', if unsatisfactory, course of action". Both of these statements added to the confusion, even though the Messing article criticized this approach, and also stated "... the drafters of Florida's Rules, and apparently the U.S. Supreme Court in *Nix*, opted for a third solution: disclosure of the client's lie," and closed with:

However, Florida's Rules and dicta in *Nix* appear to require an attorney to disclose a client's perjury if all else fails. This disclosure is a more difficult course of action for a Florida attorney than the narrative response. However, it should be viewed as the most ethical, morally correct and appropriate course of conduct when confronted with a client who intends to lie.

In its discussion of the rule to be drawn from the *Sanborn* case, the Messing article failed to point out:

(1) that *Sanborn* stood alone in Florida and was contrary to the Code of Professional Responsibility then in effect, as well as a new Rules of Professional Conduct and other Florida cases, including Supreme Court of Florida decisions;

(2) *Sanborn's* ignoring Florida cases and choosing to rely instead on one appellate case from Alaska, another from South Carolina, and a trial court case from New York was misplaced, since those three courts based their decisions on a proposed ABA defense function standard (4-7.7) which was never enacted anywhere, never approved by the ABA, and was in fact never even voted on by the ABA House of Delegates as it was withdrawn from the other defense function standards before the vote; and

(3) even though it ignored it, *Sanborn* was decided under the old Code of Professional Responsibility, not the current Rules of Professional Conduct. The current Rules, which took effect one and a half years after *Sanborn* was decided, are the Supreme Court of Florida's latest pronouncement on the narrative approach and, by their very language, the Rules rule out use of the narrative by a lying defendant.

For another view, see Braccialarghe, *Representation of a Criminal Defendant Who Intends to Lie*, FLA. B.J. at 29 (July/August 1987).

93. *Supra* note 38.

In an effort to clarify this issue, the Special Committee on Perjured Testimony voted to recommend to the Board of Governors of the Florida Bar that the Rules of Professional Conduct be amended to make it even clearer that perjured testimony was not acceptable, not even in the narrative form. The proposed amendment⁹⁴ does three

94.

Proposed Amendment to FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3(a)(4) (1987) [In place of present Section (a)(4)]

[A lawyer shall not knowingly:]

(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony which he knows to be false in the form of a narrative. If a lawyer has offered evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including notifying the tribunal and the opposing counsel.

Proposed addition to the *Comment* to 4-3.3

[to follow paragraph 13 of the present *Comment*]

A lawyer may not assist his client or any witness in offering false testimony or other evidence, nor may the lawyer permit his client or any other witness to testify falsely in the narrative form. In the event that the lawyer learns that false evidence has been offered, the lawyer must take reasonable remedial measures including informing the tribunal and opposing counsel.

The lawyer's duty to not assist witnesses including his own client in offering false evidence stems from the Rules of Professional Conduct, Florida statutes and caselaw.

Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.

Rule 4-8.4(a) prohibits a lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.

Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trust-worthiness, or fitness as a lawyer.

Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.

This rule, 4-3.3(a)(2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a)(4) prohibits a lawyer from offering false evidence and requires the lawyer to notify the tribunal and the

things: (1) it rewrites Rule 4-3.3(a)(4); (2) it adds several paragraphs after Paragraph 13 of the present Comment to 4-3.3 which integrate related rules, statutes and case law; and (3) in an attempt to make the Comment less confusing, it deletes paragraphs 9 and 10 of the present Comment to Rule 4-3.3, the paragraphs that discuss three proposed resolutions and dismiss the first two regarding the case of a criminal defendant who wants to testify falsely.

opposing counsel in the event that false evidence is offered.

Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action which the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent, although the court may order the lawyer to continue the representation notwithstanding good cause for terminating representation.

To permit or assist a client or other witness to testify falsely is prohibited by FLA. STAT. § 837.02 which makes perjury in an official proceeding a felony and by FLA. STAT. § 777.011, which proscribes aiding, abetting, or counseling commission of a felony.

Florida caselaw prohibits lawyers from presenting false testimony or evidence. *Kneale v. Williams*, 30 So. 2d 284 (Fla. 1947) states that perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to a communication between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud. *Dodd v. Florida Bar*, 118 So. 2d 17 (Fla. 1960) reminds us that "...the courts are ... dependent on members of the bar to ... present the true facts of each cause ... to enable the judge or the jury to [decide the facts] to which the law may be applied. When an attorney ... allows false testimony ... he ... makes it impossible for the scales [of justice] to balance. See also *Florida Bar v. Simons*, 391 So. 2d 684 (Fla. 1980) and *Florida Bar v. Agar*, 394 So. 2d 405 (Fla. 1981).

The United States Supreme Court in *Nix v. Whiteside*, 106 S. Ct. 988 (1986), answered in the negative the constitutional issue of whether it is ineffective assistance of counsel for an attorney to threaten disclosure of his client's (a criminal defendant) intention to testify falsely.

If a lawyer knows or reasonably believes that his client intends to commit perjury, the lawyer's first duty is to attempt to convince the client to testify truthfully. If the client still insists on committing perjury the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully convince the client to testify truthfully or prevent the client from later taking the stand and lying, the lawyer must disclose the fact that his client intends to lie to the tribunal (or has lied to the tribunal) and, per FLA. RULES OF PROFESSIONAL CONDUCT rule 4-1.6 (1987), information sufficient to prevent the commission of the crime of perjury.

If the proposed amendment is approved, Rule 4-3.3 (a)(4) would read as follows:

4-3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly: (4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony which he knows to be false in the form of a narrative. If the lawyer has offered evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including notifying the tribunal and the opposing counsel.⁹⁵

V. Argument

A. *Against Perjured Testimony in the Narrative Form*

Our system of dispute resolution, the legal system, has the twin goals of attaining just results that are also perceived as just. To help us achieve the correct/just result, we have created procedures that attempt to bring out the truth, what really happened. Presumably, if the trier of fact learns what really happened, disputes will be resolved correctly.

To aid the trier of fact in its search for the truth, we have created an adversary system with advocates for each side, not merely to insure that each side's evidence is examined, but also to point out the flaws in the other side's evidence. The flaw with the greatest potential to mislead, and therefore to produce an incorrect/unjust result, is false evidence. For that reason, our laws and our rules of ethical conduct militate against the use of false evidence. To impede perjury's success, we penalize perjury and deny it a status of equal consideration with other evidence. If we can't deny perjury entry into the arena, we can at least deprive it of a coach. If perjury makes its way into the courtroom, it must do so unaided by the advocate. This will increase the likelihood of detection.

95. The language that would be replaced of the present FLA. RULES OF PROFESSIONAL CONDUCT rule 4-3.3(a)(4) (1987) now reads:

(a) A lawyer shall not knowingly:

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the reasonable remedial measures.

B. *For Narrative Testimony*

The argument for permitting use of perjured testimony, at least in the narrative form, is the seductive plea of compromise. It says that unless we allow perjury (only in the narrative form), we members of the Bar will cease to be counselors and become policemen, informers who must stand ready to testify against our own clients and betray their intimate confidences.

It urges us to be reasonable. If the accused must fear betrayal by their lawyers, then the accused will not confide in counsel and their representation will suffer accordingly. How effective is the right to assistance of counsel if one is afraid to share one's confidences with lawyers for fear of exposure of those secrets?

And what if the word gets out that some of us, the less scrupulous, ignore the rules and help clients lie — what then would become of the righteous, who will have neither clients nor secrets?

Besides, who really knows when a client is telling the truth and when a client is lying?

C. *Conclusion*

A rule prohibiting a criminal defendant from giving false evidence in the narrative form penalizes a criminal defendant by encouraging reticence, which in turn risks leaving his attorney unprepared because he'll have fewer facts. But the opposite rule risks interjecting false evidence into the fact finder's equation. By not prohibiting false evidence, one can reasonably expect to get more of it, with the result that not only will more decisions be wrongly/unjustly decided, but the perception of the fairness of our system of dispute resolution will suffer.

Whether in response to questions and answers or given in a narrative form, perjury is wrong and the only person who stands to benefit from it is the perjurer. The Board of Governors should recommend to the Supreme Court of Florida that the Special Committee on Perjured Testimony's Proposed Amendment to Rule 4-3.3 be adopted.